another order under section 426(i)(b) of the Criminal Procedure Code that the appellant do pay a compensation in the sum of $200 to the complainant within one month from the date of this order. Counsel shall inform the Registrar when the order has been complied with.

Order accordingly.

Solicitors: *Cheang Lee & Ong.*

IPOH GARDEN BHD. v. PENGARAH TANAH DAN GALIAN, PERAK, IPOH

[O.C.J. (Hashim Yeop A. Sani J.) November 13, 1978]
[Ipoh — Originating Motion No. 43 of 1977]

Land Law — Application for sub-division of land — Condition for approval that certificates of title to be surrendered to Government and exchanged for 99 year leases — Condition ultra vires — National Land Code, ss. 42, 92, 136, 138, 195 — Federal Constitution, art. 13.

Constitutional Law — Rights to property — Federal Constitution, art. 13.

The applicant asked for an order that the decision of the respondent pursuant to the application for sub-division of the applicant in respect of certain lands be varied. The applicant sought to vary the decision in so far as it related to the question of the surrender of the said lands and the issue of leasehold titles in lieu of the freehold titles. The applicant also asked the court to direct the respondent to approve the application for sub-division without imposing the conditions objected to.

On behalf of the respondent it was argued that the letter of the respondent contained an offer not a decision.

Held: (1) the letter of the respondent sought to impose conditions for the approval of the application for sub-division which were *ultra vires* the National Land Code;

(2) the application for sub-division should be referred back to the relevant authority for reconsideration according to law.

Cases referred to:-

(1) *Sri Lempah Enterprise Sdn. Bhd.* v. *Land Executive Committee, Federal Territory* [1979] 1 M.L.J. 135 at 136.

(2) *Pengarah Tanah dan Galian, Wilayah Persekutuan* v. *Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 M.L.J. 135 at 142.

(3) *Sungai Biak Tin Mines* v. *Saw Choo Thong & Anor.* [1970] 2 M.L.J. 226.

ORIGINATING MOTION.

R.R. Chelliah (Dato Seri V. Jeyaretnam, Dato Sheikh Abdul Rahman and *N.H. Chan* with him) for the applicant.

Shaikh Daud, Legal Adviser, Perak, for the respondent.

Hashim Yeop A. Sani J.: This is a Notice of Motion in which the applicant/appellant, Ipoh Garden Berhad, a housing developer, is asking for an order that the decision of the Pengarah Tanah dan Galian, Perak, contained in his letter dated August 23, 1977 pursuant to application for sub-division of the applicant/appellant in respect of certain lands be varied. It appears from the Notice of Motion that the appeal is against the said decision "insofar as it relates to the question of the surrender of the said lands and the issue of leasehold titles in lieu of the freehold titles." The applicant is also asking that the court *direct* the respondent to approve the application for sub-division aforesaid in the terms of the aforesaid letter with the exception of certain conditions imposed in that letter, the most important among which was that the lots comprised in the sub-divided titles would be held under leases for 99 years.

A little background of the facts of the case is necessary. On May 18, 1976, the applicant pursuant to section 135 of the National Land Code applied to the State Authority for sub-division of the applicant's lands held under *freehold titles* namely, Certificates of Titles Nos. 5801, 5869, 9031, 9032, 9033, 9034, 9035, 9036, 9037 for Lots Nos. 25238, 25241, 29864, 29865, 29866, 29867, 29868, 29869 and 29870 respectively, in the Township of Ipoh. Pursuant to the said application the respondent by his letter dated August 23, 1977 (i.e. nearly sixteen months later) gave his reply to the applicant. In his letter the respondent informed the applicant that the State Government would be prepared to approve the building scheme to be undertaken by the applicant in accordance with the proposal for sub-division upon the terms and conditions as set out in the letter. Other than the usual terms, the terms and conditions contained in the said letter include the following: —

(1) The applicant to voluntarily surrender the said land held under the said Certificates of Titles to the government upon which surrender sub-divided titles would be issued.

(2) That the lots comprised in the sub-divided titles would be held under leases for 99 years.

It is primarily with these two conditions that the applicant feels aggrieved. The applicant filed an affidavit dated November 25, 1977 setting out the grounds upon which it purports to rely to obtain an order from the court to declare that the said terms as contained in the letter of the respondent referred to above are *ultra vires* and/or null and void of the National Land Code and/or the Constitution of Malaysia in that, *inter alia,* —

(1) in accordance with section 138 of the National Land Code the State Commissioner has no alternative but to approve the application for sub-division where the conditions specified in sub-section (1) of section 136 are satisfied;

(2) nowhere in the National Land Code are there any provisions that the respondent can impose on the applicant for sub-division the condition requiring the surrender of the lands in question;

(3) no provisions in the National Land Code whereunder upon approval for sub-division the respondent has the power to change the terms of the holding of the said lands from freehold to leasehold titles; and

(4) the decision of the respondent contained in the said letter is an infringement of the proprietary rights of the applicant and therefore contrary to article 13 of the Constitution of Malaysia which provides that no person shall be deprived of his property save in accordance with law.

In the affidavit of the respondent he contends that his letter dated August 23, 1977 did not pur-

port to convey a decision on the said application for sub-division. According to his affidavit that letter was purely a letter conveying an offer from the State Authority to the applicant as to the "technique of processing" the State Authority proposes in the said letter in order to assist the applicant in realising his known aim to develop the said lands for purposes of building shophouses and residential houses. The intention of the said offer is "merely to obtain consent from the applicant to subject the said land to the processes of surrender under section 195 of the National Land Code and alienation under section 42(1)(a) of the National Land Code." It is further contended in the same affidavit that the conditions proposed in the letter are not *ultra vires* the National Land Code or the Constitution of Malaysia. This contention is presumably on the same ground that the said letter of the respondent was not really a decision but an "offer" made to the applicant and has not affected the applicant's proprietary rights at all.

During the hearing of the Notice of Motion the same arguments were amplified by the learned Legal Adviser who categorically stated that the offer was based on a new policy of the State Government in accordance with the objective of encouraging conversion from freehold to leasehold. Learned counsel for the applicant argued that the rights conferred under section 92(1) of the National Land Code are indefeasible and that section 92(2) confers a right to sub-division. It was also argued on behalf of the applicant that all the conditions required under sections 135(1) and 136(1) of the National Land Code on procedure of the application for sub-division and the conditions for approval of sub-division have been fully complied with by the applicant in this case and there was no reason whatsoever to reject or delay the application for sub-division. It was also pointed out on behalf of the applicant the relevance of the provision of section 138(2) of the National Land Code which provides that if on any application under sub-section (1) thereof it appears to the Collector or the Commissioner that the conditions for approval of the sub-division specified in section 136(1) are satisfied, or that those conditions would be satisfied if the proposals in the application were modified in one or more minor respects, the Collector or Commissioner, as the case may be, shall approve the sub-division in accordance with the said proposals, modified where necessary as mentioned. Therefore since all the conditions are satisfied in this case the respondent has no alternative but to approve the application for sub-division. The letter of the respondent dated August 23, 1977 instead of approving the application imposed certain conditions outside the scope of the National Land Code. Therefore it is contended that an approval subject to surrender of the freehold titles would be illegal and *ultra vires*.

Learned counsel for the applicant cited *Sri Lempah Enterprise Sdn. Bhd.* v. *Land Executive Committee, Federal Territory,*[1] which was then pending before the Federal Court. The learned Legal Adviser submitted that the case of *Sri Lempah Enterprise Sdn.* Bhd. was distinguishable from the present case as the letter referred to in that case directed the surrender of the title but not in this case which was only an offer to surrender.

The Federal Court has now decided in the *Sri Lempah Enterprise* case[2] in the appeal brought by the Pengarah Tanah dan Galian, Wilayah Persekutuan, Kuala Lumpur. The decision of the Federal Court contained in three separate judgments of the Lord President, Raja Azlan Shah Ag. C.J., and Chang Min Tat F.J. dealt with the principles involved. The Lord President in his leading judgment posed the two questions before the Federal Court namely: —

(1) whether the Committee (Land Executive Committee of the Federal Territory) had power to make the developer give up its freehold title and receive in exchange a 99-year lease; and

(2) if not, whether the court can order the Committee to approve the developer's application but leave intact its freehold title.

With due respect to the learned Legal Adviser in the present case, the questions before this court are also the same. I cannot accept the argument that the letter of the respondent dated August 23, 1977 was only an offer and therefore did not affect the proprietary rights of the applicant. If one looks at the letter, a copy of which is attached to the affidavit of Teh Siew Hooi dated November 25, 1977, it can be seen that it first drew the attention of the applicant to the *"new policy"* of the government and that the State Authority would be *prepared to approve* the development if certain conditions are complied with and one of these conditions is that the freehold titles should be converted to 99-year leases. I concede that the respondent's letter in this case is very politely worded but it still has, in my opinion, the effect of twisting the arm of the appellant before approval for the sub-division could be granted. A lapse of sixteen months after the application was made before any reply came from the government would also indicate the state of mind of the State Authority. Therefore I cannot see any real, substantial or material distinction between the letter of the Committee in the *Sri Lempah Enterprise* case and the letter of the respondent in this case except that the letter of the respondent in this case is, as I said earlier, politely clothed to look like an offer to surrender.

The principles to be applied are set out in the judgment of the Lord President in the *Sri Lempah Enterprise* case as follows: —

"English cases are of course decisions on the peculiar words used in the Town and Country Planning Act, whereas here we are concerned with the peculiar words used in the National Land Code, but nevertheless I am of the opinion that English cases afford principles that may be followed here. What are those principles? They are:

1. The approving authority does not have an uncontrolled discretion to impose whatever conditions it likes.
2. The conditions, to be valid, must fairly and reasonably relate to the permitted development.
3. The approving authority must act reasonably and planning conditions must be reasonable.
4. The approving authority is not at liberty to use its power for an ulterior object, however desirable that object may seem to it in the public interest.

Applying these principles to the present case, it is plain, in my judgment, that the Committee does not have the power it claims to have. The condition which the applicant object-

ed to does not relate to the permitted development, is unreasonable, and is used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which, we are told, since the war only leases, not titles in perpetuity, are granted. However desirable this object may seem to the Committee, it has no power under the law to achieve it in the way used here."

Having regard to the fact that the proprietor of land has a right under section 92(2) of the National Land Code for sub-division if the conditions are complied with, conditions which are alien to the National Land Code would clearly be *ultra vires*. If the condition to substitute a freehold title to a lease for 99 years was purported to be made under section 124(5)(c) of the National Land Code then the matter has already been adjudicated on by the Federal Court in the *Sri Lempah Enterprise* case. Raja Azlan Shah Ag. C.J. in his judgment put it succinctly as follows: —

"In my opinion, the present case falls to be decided on well established principles and they are to be found in the cases decided under the (U.K.) Town and Country Planning Acts. It is unfortunate that neither in the court below nor in this court has reference been made to any of them. The Acts empower planning authorities to refuse permission or to grant permission unconditionally or to impose such conditions 'as they think fit'. On principle and authority, the discretionary power to impose such conditions 'as they think fit' is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene M.R. in *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.* ([1947] 2 All E.R. 680, 685), have regard to all relevant considerations and disregard all improper considerations, and they must produce a result which does not offend against common sense; or to repeat Lord Denning M.R.'s words in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*, ([1958] 1 Q.B. 554), (approved in *Fawcett Properties Ltd.* v. *Buckingham County Council* ([1961] A.C. 636) the *'conditions to be valid must fairly and reasonably relate to the permitted development.'*"

The second question to be decided in the present case is the second prayer of the applicant, that is, that the court direct the respondent to approve the application for sub-division according to the terms set out in the letter of the respondent dated August 23, 1977 subject to the deletion of the said offensive terms. As was the case before the High Court, Kuala Lumpur, in the case of *Sri Lempah Enterprise*, the appeal here is also under section 418 of the National Land Code. The High Court there allowed the appeal and ordered the approval of the application for conversion as well as the application for sub-division. The order of the trial judge was however set aside and the Federal Court ordered instead that the matter be remitted for reconsideration of the committee according to the law as set out in the Federal Court judgment.

An additional point in our present case is contained in paragraph 10 of the affidavit of the respondent dated May 18, 1978 which alleged that the application for sub-division made by the appellant was not properly done under section 135 of the National Land Code and that the appellant was not therefore qualified to apply for sub-division because it was contended that section 135 requires the existence of one final title for the land before it can be sub-divided whereas the application now standing is in respect of 9 separate titles. There is however no affidavit in reply to this point from the appellant. I have also looked through the letter of the respondent dated August 23, 1977 (not translated into English) but I cannot find anything in it pointing this out. Finally, this point was also never argued at all.

The function of the court in the matter of this nature is set out clearly in the judgment of Raja Azlan Shah Ag. C.J. in the *Sri Lempah Enterprise* case. It is not the province of the court to review decisions of government departments merely on their merits. This is based on the principle that judges cannot usurp the functions of the executive nor the legislature. The power of the court to interfere in cases of this nature is not that of an appellate authority but the power of the court is that of a judicial authority which is concerned only to see whether the subordinate authority has in any way contravened the law by acting in excess of the powers which the legislature has conferred upon it. This is an established principle contained in a number of authorities.

Although section 417 of the National Land Code seems to give the court wide powers to direct the land authority to do all such things as may be necessary to give effect to any judgment or order there is in my view an invisible limit imposed in that section. In the case of *Sungei Biak Tin Mines Ltd.* v. *Saw Choo Thong & Anor.*[3] the Federal Court made reference to section 417 of the National Land Code and ordered the Collector to delete the registration of the sub-lease in favour of one Mr. Lee Yat Kai and to re-register the sub-lease in favour of the defendant. But that case originally involved an alleged breach of condition of the sub-lease which cannot be applied to the present case.

Under the circumstances the appeal is allowed but the proper order to make in this case is that the application for sub-division made by the applicant be referred back to the relevant authority for reconsideration according to law. Costs to the appellant.

Appeal allowed.

Solicitors: *Cheang Lee & Ong.*